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CLERK US DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ST. DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JAMES LYNN O'HINES,

Petitioner,

v.

WARDEN JEFF FREELAND, et al.,

Respondents.

Civil No. 09-2626 WQH (AJB)

**ORDER:**

**(1) CONSTRUING DOCUMENT AS  
SECOND AMENDED PETITION; and**

**(2) DISMISSING CASE WITHOUT  
PREJUDICE AND WITH LEAVE TO  
AMEND**

On November 18, 2009, Petitioner, a state prisoner proceeding pro se submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. The matter was dismissed without prejudice and with leave to amend on December 1, 2009 because petitioner had failed to satisfy the filing fee requirement, it was unclear whether this Court was the proper venue and Petitioner had failed to name a proper respondent. (*See* Order dated Dec. 1, 2009 [doc. no. 2].) Petitioner was given until January 21, 2010 to either pay the \$5.00 filing fee or submit adequate proof of his inability to pay the fee, and submit a First Amended Petition that cured the pleading deficiencies outlined in the dismissal order.

On January 13, 2010, Petitioner filed a First Amended Petition and a motion to proceed in forma pauperis. (*See* Doc. No. 4.) Also on January 13, 2010, Petitioner filed a document entitled "Notice of Appeal," which the Court construed as an exhibit to the First Amended

1 Petition, and which cited various federal statutes. (*See* Doc. No. 8.) Although it is difficult to  
 2 decipher, Petitioner appeared to complain about the conduct of various prison officials

3 On February 4, 2010, the Court granted the motion to proceed in forma pauperis but  
 4 dismissed the case without prejudice and with leave to amend because Petitioner had failed to  
 5 name a proper respondent and had failed to state a cognizable federal claim. (*See* Order dated  
 6 Feb. 4, 2010 [doc. no 6].) Petitioner was given until April 6, 2010 to file a Second Amended  
 7 Petition which cured the pleading deficiencies outlined in the Court's order. (*Id.*)

8 On March 17, 2010, Petitioner filed a document entitled "Attachment/Supplement to 2nd  
 9 Amended Petition (Dejure) of Right." (*See* Doc. No. 10.) On April. 7, 2010, Petitioner filed a  
 10 document entitled "Notice; Second Amended Filed on Date of 2-25-10," (*see* Doc. No. 13),  
 11 which the Court **CONSTRUES** as Petitioner's Second Amended Petition.

#### 12 **FAILURE TO NAME PROPER RESPONDENT**

13 Review of the Second Amended Petition reveals that Petitioner has again failed to name  
 14 a proper respondent. On federal habeas, a state prisoner must name the state officer having  
 15 custody of him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996)  
 16 (citing Rule 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a  
 17 habeas petition fails to name a proper respondent. *See id.*

18 The warden is the typical respondent. However, "the rules following section 2254 do not  
 19 specify the warden." *Id.* "[T]he 'state officer having custody' may be 'either the warden of the  
 20 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal  
 21 institutions.'" *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee's note). If "a  
 22 petitioner is in custody due to the state action he is challenging, '[t]he named respondent shall  
 23 be the state officer who has official custody of the petitioner (for example, the warden of the  
 24 prison).'" *Id.* (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee's note).

25 A long standing rule in the Ninth Circuit holds "that a petitioner may not seek [a writ of]  
 26 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The  
 27 actual person who is [the] custodian [of the petitioner] must be the respondent." *Ashley v.*  
 28 *Washington*, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of

1 habeas corpus acts upon the custodian of the state prisoner, the person who will produce "the  
2 body" if directed to do so by the Court. "Both the warden of a California prison and the Director  
3 of Corrections for California have the power to produce the prisoner." *Ortiz-Sandoval*, 81 F.3d  
4 at 895.

5 Here, Petitioner has incorrectly named "Warden Jeff Freeland, The California Attorney  
6 General, and the Arizona State Attorney General" as Respondents. In order for this Court to  
7 entertain the Petition filed in this action, Petitioner must name the warden in charge of the state  
8 correctional facility in which Petitioner is presently confined or the Director of the Department  
9 of Corrections. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

#### 10 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

11 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner  
12 has failed to allege that his state court conviction or sentence violates the Constitution of the  
13 United States.

14 Title 28, United States Code, § 2254(a), sets forth the following scope of review for  
15 federal habeas corpus claims:

16 The Supreme Court, a Justice thereof, a circuit judge, or a district  
17 court shall entertain an application for a writ of habeas corpus in  
18 behalf of a person in custody pursuant to the judgment of a State  
19 court only on the ground that he is in custody in violation of the  
20 Constitution or laws or treaties of the United States.

21 28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir.  
22 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800  
23 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim  
24 under § 2254, a state prisoner must allege both that he is in custody pursuant to a "judgment of  
25 a State court," and that he is in custody in "violation of the Constitution or laws or treaties of the  
26 United States." *See* 28 U.S.C. § 2254(a).

27 The Second Amended Petition is difficult to decipher, but Petitioner appears to complain  
28 about various acts committed by prison officials, various celebrities and state legislators, medical  
malpractice and parole violation procedures. In no way does Petitioner claim he is "in custody  
in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254.  
While courts should liberally interpret pro se pleadings with leniency and understanding, this

1 should not place on the reviewing court the entire onus of ferreting out grounds for relief.  
 2 *Zichko v. Idaho*, 247 F.3d 1015, 1020-21 (9th Cir. 2001). In order to satisfy Rule 2(c), Petitioner  
 3 must point to a “real possibility of constitutional error.” *Cf. Blackledge v. Allison*, 431 U.S. 63,  
 4 75 n.7 (1977) (internal quotation marks omitted). Facts must be stated, in the petition, with  
 5 sufficient detail to enable the Court to determine, from the face of the petition, whether further  
 6 habeas corpus review is warranted. *Adams v. Armontrout*, 897 F.2d 332, 334 (8th Cir. 1990).  
 7 Moreover, the allegations should be sufficiently specific to permit the respondent to assert  
 8 appropriate objections and defenses. *Harris v. Allen*, 739 F. Supp. 564, 565 (W.D. Okla. 1989).  
 9 Here, the lack of grounds for relief in the Second Amended Petition prevents the Respondent  
 10 from being able to assert appropriate objections and defenses.

#### 11 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

12 Further, habeas petitioners who wish to challenge either their state court conviction or the  
 13 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.  
 14 § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). Ordinarily, to satisfy the  
 15 exhaustion requirement, a petitioner must “fairly present[] his federal claim to the highest state  
 16 court with jurisdiction to consider it . . . or . . . demonstrate[] that no state remedy remains  
 17 available. *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996) (citing *Picard v. Connor*, 404  
 18 U.S. 270, 275 (1971); *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). Moreover, to properly  
 19 exhaust state court remedies a petitioner must allege, in state court, how one or more of his or  
 20 her federal rights have been violated. For example, “[i]f a habeas petitioner wishes to claim that  
 21 an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed  
 22 by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state  
 23 court.” *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)(emphasis added).

24 Nowhere on the Second Amended Petition does Petitioner allege that he raised his claims  
 25 in the California Supreme Court. In fact, he specifically indicates he did not seek review in the  
 26 California Supreme Court. (See Pet. at 5.) If Petitioner has raised his claims in the California  
 27 Supreme Court he must so specify.

28 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death  
 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ

1 of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation  
2 period shall run from the latest of:

3 (A) the date on which the judgment became final by the  
4 conclusion of direct review or the expiration of the time for seeking  
such review;

5 (B) the date on which the impediment to filing an application  
6 created by State action in violation of the Constitution or laws of the  
United States is removed, if the applicant was prevented from filing  
by such State action;

7 (C) the date on which the constitutional right asserted was  
8 initially recognized by the Supreme Court, if the right has been  
newly recognized by the Supreme Court and made retroactively  
9 applicable to cases on collateral review; or

10 (D) the date on which the factual predicate of the claim or  
11 claims presented could have been discovered through the exercise  
of due diligence.

12 28 U.S.C.A. § 2244(d)(1)(A)-(D).

13 The statute of limitations does not run while a properly filed state habeas corpus petition  
14 is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).  
15 *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’  
16 when its delivery and acceptance [by the appropriate court officer for placement into the record]  
17 are in compliance with the applicable laws and rules governing filings.”). However, absent some  
18 other basis for tolling, the statute of limitations does run while a federal habeas petition is  
19 pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

20 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
21 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to  
22 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.  
23 § 2254. Here, it appears plain from the Second Amended Petition that Petitioner is not presently  
24 entitled to federal habeas relief because he has not alleged exhaustion of state court remedies.

### 25 VENUE

26 Moreover, it is unclear whether this Court is the proper venue for Petitioner’s action. A  
27 petition for writ of habeas corpus may be filed in the United States District Court of either the  
28 judicial district in which the petitioner is presently confined or the judicial district in which he  
was convicted and sentenced. *See* 28 U.S.C. § 2241(d); *Braden v. 30th Judicial Circuit Court*,

1 410 U.S. 484, 497 (1973). Petitioner is presently confined in Arizona State Prison in Florence,  
 2 Arizona. Petitioner does not say where the state court conviction he seeks to challenge occurred.  
 3 Should Petitioner file a Third Amended Petition, he is directed to inform the Court where the  
 4 state court conviction he is challenging occurred.

### 5 FAILURE TO USE PROPER FORM

6 Additionally, a petition for writ of habeas corpus must be submitted in accordance with  
 7 the Local Rules of the United States District Court for the Southern District of California. *See*  
 8 Rule 2(c), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be  
 9 submitted upon a court-approved form and in accordance with the instructions approved by the  
 10 Court. Presently, Petitioner has submitted an application for writ of habeas corpus on a non-  
 11 approved form.

### 12 CONCLUSION AND ORDER

13 For all the foregoing reasons, the Court **DISMISSES** the Second Amended Petition  
 14 without prejudice and with leave to amend. To have this case reopened, Petitioner must file a  
 15 Third Amended Petition **no later than June 1, 2010** which cures the pleading deficiencies noted  
 16 in this Order. *Petitioner is advised that if he does not cure the pleading deficiencies outlined*  
 17 *in this Order in his Third Amended Petition, the Court will dismiss this case without further*  
 18 *leave to amend.*

19 *The Clerk of Court is directed to send Petitioner a blank Third Amended Petition form*  
 20 *along with a copy of this Order.*

21 **IT IS SO ORDERED.**

22 DATED: 4/9/10



23 William D. Hayes  
 24 United States District Judge